No. 90-1279

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

MYRA JO COLLINS,

Petitioner,

—v.—

CITY OF HARKER HEIGHTS, TEXAS,

Respondent.

ON WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION AND THE TEXAS CIVIL LIBERTIES UNION IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI*[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonpartisan organization with nearly 300,000 members dedicated to preserving and protecting the civil rights and civil liberties guaranteed by law. The Texas Civil Liberties Union is one of the ACLU's state affiliates.

The ACLU has long worked to defend basic constitutional rights and, in so doing, has filed numerous briefs with this Court as counsel for a party or as *amicus curiae* in many cases requiring construction of 42 U.S.C. §1983, the statute at issue in this case. The ACLU has been particularly concerned about the use of §1983 as a remedy for injuries which arise from inadequate municipal training and supervision.

Because this case raises important issues regarding the standards for imposing liability under §1983 for municipal training and supervision, as well as important questions regarding the kinds of activity that rise to the level of a constitutional tort, the ACLU respectfully submits this brief *amicus curiae*.

STATEMENT OF THE CASE

Amici adopt the statement of the case presented by petitioner.

SUMMARY OF ARGUMENT

Petitioner has stated a cause of action under 42 U.S.C. §1983 against respondent city for its failure to adequately train and supervise its employees. Nothing in the legislative history of 42 U.S.C. §1983 or the prior

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3.

decisions of this Court supports the conclusion of the court below that an employee asserting a substantive due process claim against a municipality must demonstrate the violation of some uniquely governmental power as distinguished from its power as an employer. Section 1983 provides a remedy for all deprivations of constitutional rights which result from the arbitrary action of government, whether the government is acting in its capacity as an employer, as a legislature, or in some other capacity.

This is not to say that the existence of a voluntary employment relationship is irrelevant to the question of whether a city has acted arbitrarily, particularly where the relationship is indicative of a knowing assumption of the risks posed by dangerous work conditions. But where, as here, the inadequacy of the city's training program is unknown to an employee and directly contrary to the mandate of state law, the voluntary nature of the employment relationship in no way diminishes the city's arbitrary and deliberate indifference to the life and safety of its employees. Thus, on these facts, petitioner has stated a claim for deprivation of her husband's right to be free from bodily injury arbitrarily inflicted by the state.

ARGUMENT

I. ABUSE OF A UNIQUELY GOVERNMENTAL POWER IS NOT A PREREQUISITE FOR A §1983 ACTION

The court of appeals defined the issue presented by this case as:

> whether a plaintiff seeking recovery under §1983 for injury to a governmental employee must demonstrate, *inter alia*, that the conduct in issue was an abuse of *governmental* power. More particularly, does alleged wrongful conduct by government -- in its capacity as employer rather than as a governing authority -- that deprives its employee of an alleged constitutional right give rise to a §1983 action? We base our holding on the abuse of government power standard, separate from the constitutional deprivation element or standard.

Collins v. City of Harker Heights, Texas, 916 F.2d 284, 286 (5th Cir. 1990)(emphasis in original). In its subsequent discussion, the court made clear its belief that the "abuse of government power" standard requires an "abuse of [some] particular authority or obligation held by the government" as distinguished from actions which are "essentially indistinguishable from the role of a private employer." *Id.* at 288, *quoting Rankin v. City of Wichita Falls*, 762 F.2d 447, 449 (5th Cir. 1985). Reasoning that §1983 applies only to "use of governmental power on the governed, to government *qua* government," *id.* at 287, and not to actions of a city in the role of employer, the court summarily dismissed plaintiff's claims against the city for its deliberate indifference to the safety of its employees.[2]

The court below did not elaborate on the distinction between uniquely governmental action and other kinds of state action, except to suggest that arrest and detention policies, such as those at issue in *City of Canton v. Harris*, 489 U.S. 378 (1989), are uniquely governmental while employment and perhaps other kinds of policies

[2] The Fifth Circuit's reasoning is similar to that in *McClary v. O'Hare*, 786 F.2d 83 (2d Cir. 1986), another case involving an on-the-job injury to a government employee in which the court held that there was no abuse of government authority and, thus, no improper state action because the plaintiff failed to demonstrate that the state conduct complained of was of a "uniquely governmental character." *Id.* at 89 n.6.

which parallel private action are not. Whatever the distinction may be, however, there is no basis in law for imposing such restrictions on the scope of §1983.

Amici can find nothing in the legislative history of §1983 to support the proposition that §1983 was intended as a remedy only for "uniquely governmental" action, but not other kinds of action taken under color of state law. To the contrary, this Court's review of the legislative history of §1983 led it to the conclusion that "Section 1 of the Civil Rights Act [§1983] was intended to provide a remedy, to be broadly construed, against all forms of official violation of federally protected rights." *Monell v. Dep't of Social Services of New York*, 436 U.S. 658, 700-01 (1978). As Rep. Shellabarger explained during the debates on the Civil Rights Act:

> [Section 1] not only provides a civil remedy for persons whose former condition may have been that of slaves, but also to all people where, under color of State law, they or any of them may be deprived of rights to which they are entitled under the Constitution by reason and virtue of their national citizenship.

Cong. Globe, 42d Cong., 1st Sess. (1871), App. 68, *quoted in Monell*, 436 U.S. at 683.

To be sure, common law has traditionally drawn a distinction between a municipality's liability for governmental actions and its liability for nongovernmental actions. But this Court has concluded, based on the legislative history and purpose of the Civil Rights Act, that this distinction are inapplicable to §1983. *Owen v. City of Independence*, 445 U.S. 622, 644 (1980).[3] Whether

[3] As *Owen* ironically makes clear, the common law liability of munici- (continued...)

characterized as governmental or proprietary, legislative or ministerial, all municipal action is subject to the constitutional limitations made enforceable through §1983. *Id.*

Similarly, this Court has construed the "under color of state law" and "state action" requirements of §1983 broadly to encompass all kinds of governmental conduct, including conduct which parallels private action. For example, in *Griffin v. Maryland*, 378 U.S. 130, 135 (1964), the Court noted:

> If an individual is possessed of state authority and purports to act under that authority, his action is state action. It is irrelevant that he might have taken the same action had he acted in a purely private capacity or that the particular action which he took was not authorized by state law.

Id. at 135. More recently, in *West v. Atkins*, 487 U.S. 42 (1988), the Court reiterated this principle when it held that a private physician's deliberate indifference while working under contract for the state was actionable under §1983:

> . . . the fact that a state employee's role parallels one in the private sector is not, by itself, reason to conclude that the former is not acting under color of state law in performing his duties.

Id. at 56 n.15.

[3] (...continued)
pal corporations for their proprietary or nongovernmental functions was well established when §1983 was enacted. 445 U.S. at 644. Thus, the only issue in *Owen* was whether municipalities should be similarly liable for the exercise of their governmental powers.

In accord with these decisions, this Court has held that the substantive guarantees of the due process clause invoked by petitioner apply to governmental employment relationships and may be enforced through §1983. *Monell* itself upheld an employee's right to challenge the constitutionality of a government agency's employment policies under §1983. Since that time the Court has ruled in numerous other cases in which §1983 was invoked to challenge the constitutionality of policies affecting the employer-employee relationship. *See, e.g., Rutan v. Republican Party of Illinois*, ___ U.S. ___, 110 S.Ct. 2729 (1990)(hiring and promotion policies based on political affiliation violate due process); *Rankin v. McPherson*, 483 U.S. 378 (1987)(termination of employee for speaking on issue of public importance violates due process); *Owen v. City of Independence*, 445 U.S. 622 (city counsel's false and stigmatizing charges against sheriff in the context of discharge violate liberty interest); *Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1974)(school policy requiring pregnant teachers to take leave of absence violates due process).

The only distinction between these substantive due process cases and the one now before the Court is the fact that the former cases involved intentional employment policies which were themselves unconstitutional, whereas the case *sub judice* involves an informal, but nonetheless very real, policy of deliberate indifference to the constitutional rights of employees. *City of Canton*, 489 U.S. 378, makes clear, however, that the elements of a §1983 claim are the same in both kinds of cases. It may be necessary to muster more proof to establish the existence of a policy of deliberate indifference and to demonstrate that such a policy was the moving force behind a deprivation of life or liberty but, if such a policy is proven, a city may be held liable for the injuries it causes. *Id.* at 390-92. *See also Smith v. Wade*, 461 U.S. 30, 43 n.10 (1983)(deliberate indifference is "equivalent to intent, meaning that the two are equally culpable and deserving of punishment and deterrence.").[4]

Thus, the mere fact that this case involves the employer-employee relationship does not take it out of the purview of §1983 and the lower court's conclusion to the contrary should be reversed. This is not to say that the court of appeals' focus on the employer-employee relationship is utterly irrelevant to §1983 analysis. As discussed below, such a relationship may have a bearing on whether a constitutional tort has been pled. But the fact that a claim involves the employer-employee relationship, standing alone, does not preclude liability under §1983.

II. PETITIONER HAS ALLEGED A DEPRIVATION OF A CONSTITUTIONAL RIGHT

Because the court below erroneously believed that a §1983 action required some uniquely governmental action, it did not reach the issue of whether petitioner adequately pled a deprivation of a constitutional right. *See Collins*, 916 F.2d at 287. In fact, petitioner has alleged a colorable claim that her husband was deprived

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[4] The importance of holding a city liable for its deliberate indifference to an employee's life and safety cannot be overstated. In *Owen v. City of Independence*, 445 U.S. 622, a case involving violations of an employee's due process rights, this Court recognized that:

> the threat that damages might be levied against the city may encourage those in a policymaking position to institute internal rules and programs designed to minimize the likelihood of unintentional infringements on constitutional rights. Such procedures are particularly beneficial in preventing those "systemic" injuries that result not so much from the conduct of any single individual, but from the interactive behavior of several government officials, each of whom may be acting in good faith.

Id. at 652 (footnote omitted). The failure to train and supervise employees, such as petitioner alleges in this case, is most likely to result from such unintentional conduct on the part of several officials.

of his Fourteenth Amendment liberty interest in personal security and physical safety by the city's failure to provide minimally adequate training and supervision to its sewer workers.

The right to be free from, and to obtain judicial relief for, unjustified intrusions on personal security has long been recognized as one of the rights protected by the Fourteenth Amendment. *Ingraham v. Wright*, 430 U.S. 651 (1977). This right to personal security does not impose an affirmative duty on the state to protect the public from invasions by private actors, *DeShaney v. Winnebago County Dep't of Social Services*, 489 U.S. 189, 195 (1989), but it does require the state to avoid arbitrarily inflicting injury itself. *See, e.g., Ingraham*, 430 U.S. 651; *Screws v. U.S.*, 325 U.S. 91 (1945)(construing criminal equivalent of §1983). Where state action creates a substantial risk of injury, this means that the state has a duty to take reasonable precautions, such as providing training and supervision, to help avoid unnecessary injury. Failure to take such precautions where they are readily available may, in certain circumstances, constitute precisely the kind of arbitrary government action that §1983 was intended to redress.

Thus, for example, in *City of Canton*, 489 U.S. at 392-93, this Court recognized that holding individuals in custody, and thereby cutting off their access to private aid, creates a sufficient risk of injury that the city may be held liable if it fails to take the obvious precaution of training jailers to recognize a detainee's need for medical attention. Similarly, in *Youngberg v. Romeo*, 457 U.S. 307 (1982), the Court held that the risks to the mentally retarded resulting from commitment to a state institution require the state to provide minimally adequate or reasonable training to the committed individuals themselves, "to ensure their safety and freedom from undue restraint." 457 U.S. at 319.

Contrary to the implications of the lower court's

opinion, the constitutional duty to provide training and supervision is not limited to the training of police forces or to situations where an individual is in state custody. The duty to provide minimal training and supervision recognized in *Youngberg* and *City of Canton* did not arise from the fact of custody itself but from the fact that custody created a substantial risk of injury, along with limited opportunities for outside relief that the state had an obligation to address if it was to avoid arbitrarily inflicting injury. Of course, holding an individual in custody is only one of many ways in which a municipality may expose an individual to a substantial risk of injury. There are a myriad of city policies, including employment policies, which may create a risk of serious harm. And, when a city pursues such policies, "the Due Process Clause requires the state to protect [the individuals involved] to the extent of ameliorating the incremental risk." *Archie v. City of Racine*, 847 F.2d 1211, 1223 (7th Cir. 1988)(*en banc*), *cert. denied*, 489 U.S. 1065 (1989). This proposition is hardly a novel one. Indeed, the principle that the government has a constitutional duty to make reasonable efforts to protect all persons it affirmatively exposes to a risk of injury, not just those it holds in custody, has been recognized by at least six circuit courts of appeals.[5]

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[5] *See e.g., Ross v. U.S.*, 910 F.2d 1422 (7th Cir. 1990)(county policy prohibiting private individuals from attempting rescues in Lake Michigan creates unnecessary risk of injury for which the county may be held liable); *Archie*, 847 F.2d at 1223 (*dicta*); *Gregory v. City of Rogers, Ark.*, 921 F.2d 750 (8th Cir. 1990)(officer's arrest of driver and decision to allow intoxicated passengers to drive car created unreasonable risk of injury actionable under §1983); *Ruge v. City of Bellevue*, 892 F.2d 738 (8th Cir. 1989)(city liable for policies which create unsafe employment conditions); *Stoneking v. Bradford Area School Dist.*, 882 F.2d 720 (3d Cir. 1989), *cert. denied*, 110 S.Ct. 840 (1990)(school liable for policies which subjected students to increased risk of sexual abuse); *Wood v. Ostrander*, 879 F.2d 583 (9th Cir. 1989), *cert. denied*, 111 S.Ct. 341 (1990)(officer liable for causing woman to

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This same principle applies to the instant case. The operation of a sewer system is inherently dangerous and sending workers into the sewer clearly exposes them to substantial risks of injury. Obviously a city cannot be required to eliminate all dangers from its sewers, but neither can it entirely ignore those dangers when readily available protective equipment and training could greatly reduce the risk of injury. A municipality's failure to take such minimal precautions to protect its employees from the dangers inherent in its sewer system is just as offensive to the goals of §1983 as a city's failure to protect its detainees by training its officers to recognize when detainees require medical assistance. The Constitution guarantees all persons, sewer workers and detainees alike, the right not to be deprived of their lives through the arbitrary action of government.[6]

Although the Fifth Circuit erred in attempting to draw a bright line rule precluding municipal employees from obtaining redress for injuries caused by inadequate training, that is not to say that the employer-employee relationship is irrelevant to the question of whether a particular failure to train violates the Constitution. In certain circumstances, the employment relationship may be highly relevant. Where, for example, no practical

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[5] (...continued)
be abandoned at night at side of dangerous highway); *Taylor v. Ledbetter*, 818 F.2d 791 (11th Cir. 1987)(*en banc*), *cert. denied*, 109 S.Ct. 1227 (1989)(state's failure to adequately supervise foster home placements creates unreasonable dangers for which state may be held liable); *Nishiyama v. Dickson County, Tenn.*, 814 F.2d 277 (6th Cir. 1987) (failure to supervise use of patrol car by jail inmate actionable under §1983).

[6] If sending prisoners into unsafe sewers constitutes cruel and unusual punishment actionable under §1983, *see e.g., Fruit v. Norris*, 905 F.2d 1147 (8th Cir. 1990), then surely sending municipal workers, who cannot be punished at all, into unsafe sewers is also actionable under §1983.

means exists to eliminate the dangers inherent in a particular job, an employee's knowing and voluntary decision to remain on the job and accept the risk of injury clearly impacts upon the reasonableness of the state's action in allowing the risk of injury to exist.[7]

Walker v. Rowe, 791 F.2d 507 (7th Cir.), *cert. denied*, 479 U.S. 994 (1986), is a case in point. There, prison guards injured in a prison riot sued the state for failing to maintain a suitably safe prison facility. The Court noted that there were legitimate financial reasons why the state chose to accept a certain level of risk in its prisons. The court also noted that the guards were aware of the danger and could have protected themselves by looking elsewhere for work. In light of those facts, the court concluded that the state's decision to tolerate a certain level of risk was neither unreasonable nor reckless:

> The state must protect those it throws in snake pits, but the state need not guarantee that volunteer snake charmers will not be bitten. It may not throw Daniel into the lions' den, but if Daniel chooses to be a lion tamer in the state circus, the state need not separate Daniel from his charges with an impenetrable shield.

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[7] As the Court noted in Youngberg v. Romeo:

> In determining whether a substantive right protected by the Due Process Clause has been violated, it is necessary to balance 'the liberty of the individual' and 'the demands of an organized society.' *Poe v. Ullman*, 367 U.S. 497, 542 (1961)(Harlan, J., dissenting). In seeking this balance in other cases, the Court has weighed the individual's interest in liberty against the State's asserted reasons for restraining individual liberty.

457 U.S. at 320 (1982).

Id. at 511.

This same "assumption of the risk" analysis could also be used to explain the result in *Rankin v. City of Wichita Falls*, 762 F.2d 447, without the necessity of invoking vague distinctions between governmental and nongovernmental state action. According to the Fifth Circuit, the dangers of the waste treatment plant were "patent," *id.* at 446, and the employee who drowned certainly knew that he could not swim, yet he voluntarily agreed to work at the plant anyway. In those circumstances, the city's failure to provide safer working conditions may have been sufficiently reasonable to avoid the imputation of arbitrary action to the city.[8]

On the other hand, the voluntariness of an employee's association with the city may be irrelevant to the reasonableness of the city's action where the employee is unaware of the danger he faces. In such circumstances, an employee cannot accept the risk or protect himself from it any more than a prisoner can protect himself in a dangerous prison cell.[9] For example, in *Cornelius v.*

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[8] This same assumption of the risk analysis could also be used to explain the results in several other cases relied upon by the court below, including *de Jesus Benevides v. Santos*, 883 F.2d 385 (5th Cir. 1989); *Hogan v. City of Houston*, 819 F.2d 604 (5th Cir. 1987); *Washington v. District of Columbia*, 802 F.2d 1478 (D.C.Cir. 1986).

[9] This is the error in the analysis in *Dawson v. Milwaukee Housing Authority*, 930 F.2d 1283 (7th Cir. 1991). It assumes that the employees will always be aware of the dangers inherent in their employment and can choose to accept the risks of injury. That may be true with respect to police and fire department positions, but it is not necessarily true in other cases.

A city's failure to give its employees notice of serious risks inherent in their employment may also deprive an employee of procedural due process. *Cf. Burns v. United States*, 59 U.S.L.W. 4625 (June 13, 1991)(No. 89-7260). Where the risk of erroneous deprivation of life or liberty is great and notice of the risk can easily be provided be-

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Town of Highland Lake, Ala., 880 F.2d 348 (11th Cir. 1989), *cert. denied*, 110 S.Ct. 1784 (1990), a town employee was kidnapped and terrorized by state prisoners assigned to the town community work squad. The plaintiff asserted a §1983 claim against the town for its deliberate indifference in supervising the work squad and against the prison officials for their deliberate indifference in assigning violent criminals to the squad. Neither of these dangers was readily apparent to Ms. Cornelius and her voluntary decision to work as town clerk can hardly be described as an acceptance of the risk posed by the defendants' inadequate supervision of the work squad. In these circumstances, the town's deliberate indifference represents precisely the sort of abuse of government power actionable under §1983 and Ms. Cornelius' status as a voluntary employee is simply irrelevant to that determination.[10]

This is not to say that a municipality may avoid liability simply by ensuring that the dangers created by

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[9] (...continued)
fore an individual begins work, procedural due process would require that the worker be given notice and the opportunity to make an informed decision as to whether to accept the employment. Certainly a city should not be able to treat an employee as though he had volunteered to risk his liberty when he has not. *Cf. Zinermon v. Burch*, ___ U.S. ___, 110 S.Ct. 975 (1990).

[10] Under this analysis, the Eleventh Circuit's use of "special relationship" and "special danger" analysis to uphold Ms. Cornelius' cause of action is unnecessary. Ms. Cornelius alleged a failure to supervise which was so likely to cause injury and so utterly without justification, that it could reasonably be called a policy of deliberate indifference for which the town was responsible. The town could be held liable to any person actually injured by such a policy, whether courthouse employee, or passerby. It is the utter lack of justification for the grave danger created by the town's failure to supervise that renders the town liable, not the fact that there is something "special" about the danger or "special" about the town's relationship with Ms. Cornelius. *See Archie v. City of Racine*, 847 F.2d at 1223.

its inadequate training and supervision are well known to its employees. It may happen that the need for training is so obvious and so easily accommodated that a city can be said to be deliberately indifferent to the safety of its employees whether or not workers can be found who are willing to assume the risk of inadequate training. Such would be the case where, as here, the state legislature has determined that specific safety precautions must be provided regardless of workers' willingness to do without them.

In the end, attempts to devise bright line rules regarding the right to safe treatment based on an individual's relationship with the city -- whether as employee, detainee, or some other "special relationship" -- are not analytically useful. *See Archie*, 847 F.2d at 1223. The notion of due process is a:

> concept less rigid and more fluid than those envisaged in other specific and particular provisions of the Bill of Rights. Its application is less a matter of rule. Asserted denial is to be tested by an appraisal of the totality of facts in a given case. That which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, may, in other circumstances, and in the light of other considerations, fall short of such denial.

Betts v. Brady, 316 U.S. 455, 462 (1942)(footnote omitted). The "totality of facts" which must be considered in any failure to train or supervise case will necessarily include examination of the financial and practical aspects of more or different training, the extent to which the city could foresee serious injury arising from its allegedly inadequate training program, as well as the individual's ability to protect him or herself from the dangers created. All of these issues are subsumed in the ultimate

question, whether the city's action amounts to deliberate indifference to the life or safety of the injured party. The high level of proof necessary to establish such indifference guarantees that §1983 will not become a "font of tort law to be superimposed upon whatever systems may already be administered by the States." *Paul v. Davis*, 424 U.S. 693, 701 (1976).

Nevertheless, in cases such as this one, where the allegation is made that municipal employment policies senselessly subject employees (or others) to a high degree of risk, there is no reason why the municipality should not be held to answer in damages for serious injuries caused by those policies, just as it must answer in damages for other policies which deprive citizens of their life, liberty, or property.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed and the case remanded to the district court for trial of petitioner's §1983 claims.

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